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CLERK

No. 79-1618

IN THE

# Supreme Court of the United States

October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

*Petitioner,*

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## JOINT APPENDIX

THOMAS J. MILLER
*Attorney General of Iowa*

MARK E. SCHANTZ
*Solicitor General*
Hoover State Office Bldg.
Des Moines, Iowa 50312
Telephone: 515-281-5191

ROBERT W. GOODWIN
*Special Asst. Atty. General*

LESTER A. PAFF
*Assistant Attorney General*

*Attorney for Respondents*

JOHN DUNCAN VARDA

JOHN H. LEDERER
ANTHONY R. VARDA

DeWITT, SUNDBY, HUGGETT
& SCHUMACHER, S.C.

121 South Pinckney Street
P.O. Box 2509
Madison, Wisconsin 53701
Telephone: 608-255-8891

*Attorneys for Petitioner*

PETITION FOR CERTIORARI FILED APRIL 15, 1980
CERTIORARI GRANTED APRIL 6, 1981

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# Supreme Court of the United States

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CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

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RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

*Respondents.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## OPINIONS BELOW

### UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

Consolidated Freightways Corporation of Delaware, a Delaware corporation,

*Appellee,*

vs.

RAYMOND KASSEL, ETC. *et al.*,

*Appellants.*

Appeal from the United States District Court for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40. be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

* * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

*Appellee,*

v.

RAYMOND KASSEL ETC., *et al.*,

*Appellants.*

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

### DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

| | |
|---|---|
| June 13, 1978 | —Plaintiff Consolidated Freightways filed its Complaint and Motion for Preliminary Injunction on the U.S. District Court for the Southern District of Iowa. |
| July 5, 1978 | —Defendants' Original Answer filed. |
| July 26, 1978 | —Defendant-Intervenor's Answer filed. |
| January 22, 1979 | —Amended Complaint filed. |
| February 2, 1979 | —Amended Answer of Defendants filed. |
| May 16, 1979 | —Order Bifurcating Attorney Fees Claim from Trial on Case-in-Chief. |
| May 29, 1979 | —Amended Answer of Defendant-Intervenors filed. |
| June 5, 1979 | —Trial Commenced. |
| June 27, 1979 | —Trial Evidence Closed. |
| August 16, 1979 | —Memorandum Opinion, Order, and Judgment entered. |
| August 17, 1979 | —Notice of Appeal filed. |
| August 20, 1979 | —Motion for stay pending appeal denied by District Court. |

### EIGHTH CIRCUIT COURT OF APPEALS

| | |
|---|---|
| September 10, 1979 | —Motion for stay pending appeal denied by 8th Circuit Court of Appeals. |
| October 11, 1979 | —Oral argument before 8th Circuit Court of Appeals. |
| December 7, 1979 | —District Court decision affirmed. |

| | |
|---|---|
| December 21, 1979 | —Appellee's bill of costs filed [included in those costs were attorney's fees for appellate work under 42 U.S.C. §1988]. |
| January 2, 1980 | —Appellant's resistance to Appellee's bill of costs filed. |
| January 16, 1980 | —Taxation of attorney's fees denied by Eighth Circuit Court of Appeals. |
| January 28, 1980 | —Appellee's motion to vacate the order of January 16, 1980, filed. |
| February 1, 1980 | —Defendant's notice of appeal filed. |
| February 13, 1980 | —Motion to vacate is denied by Eighth Circuit Court of Appeals. |
| May 19, 1980 | —Probable Jurisdiction noted. |
| April 15, 1980 | —Petition for Certiorari Docketed. |
| March 24, 1981 | —Lower Court Decisions in No. 79-1320, *Raymond Kassel, et al., v. Consolidated Freightways of Delaware,* affirmed. |
| April 6, 1981 | —Certiorari Granted. |

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**
**AMENDED COMPLAINT**
**Filed January 22, 1979**
**[Caption Omitted in Printing]**

NOW COMES the Plaintiff, Consolidated Freightways Corporation of Delaware, a Delaware corporation, and for a Complaint against the above-named Defendants alleges as follows:

## I. JURISDICTION

1. This Honorable Court has jurisdiction of this controversy under 28 USC § 1331, 28 USC § 1332, 28 USC § 1343, 42 USC § 1983 and 28 USC § 2201-02.

2. Plaintiff Consolidated Freightways Corporation of Delaware is a Delaware corporation with its principal place of business at 175 Linfield Drive, Menlo Park, California.

3. Defendant Raymond Kassel is the Director of Transportation, State of Iowa, and on information and belief resides at 913 Eleventh Street, Nevada, Iowa 50201.

4. Defendant Robert Rigler is a member and the Chairman of the Transportation Commission, State of Iowa, and on information and belief resides at 251 South Locust Avenue, New Hampton, Iowa 50659.

5. Defendant L. Stanley Schoelerman is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 307 East Fourth, P. O. Box 390, Spencer, Iowa 51301.

6. Defendant Don Gardner is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 3110 Ravenwood Terrace, NW, Cedar Rapids, Iowa 52405.

7. Defendant Jules Busker is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 2902 Jackson, Sioux City, Iowa 51104.

8. Defendant Allan Thoms is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 510 St. George Street, Dubuque, Iowa 52001.

9. Defendant Barbara Dunn is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 530 - 44th Street, Des Moines, Iowa 50312.

10. Defendant William McGrath is a member of the Transportation Commission, State of Iowa, and on information and belief resides at Box 36, Melrose, Iowa 52569.

11. Defendant Jon McCoy is Director of the Motor Vehicle Division, State of Iowa, and resides at 1412 Harding, Ames, Iowa 50010.

12. Defendant Charles W. Larson is Commissioner of the Department of Public Safety, State of Iowa, and on information and belief resides at Rural Route 2, Bittersweet, Newton, Iowa 50208.

13. Defendant Col. Edward Dickinson is Chief of the Iowa Highway Patrol, Department of Public Safety, State of Iowa, and on information and belief resides at 1105 SE Innsbruck Drive, Ankeny, Iowa 50021.

14. Defendant Richard C. Turner is Attorney General, State of Iowa, and on information and belief resides at 1054 - 21st Street, West Des Moines, Iowa 50265.

15. Defendant Robert D. Ray is Governor of the State of Iowa, and on information and belief resides at 2300 Grand Avenue, Des Moines, Iowa 50312.

16. This controversy is between citizens of different states.

17. This action arises under Article I, Section 8, and the Fourteenth Amendment of the United States Constitution and 42 USC § 1983, as more fully appears hereafter.

18. The amount in controversy exclusive of interests and costs exceeds $10,000.00.

## II. FIRST CAUSE OF ACTION

19. Plaintiff Consolidated Freightways is a common carrier duly certificated by the Interstate Commerce Commission under Certificate of Public Convenience and Necessity MC-42487 and various subnumbers thereunder. It holds authority to operate as a common motor carrier of general commodities (exluding certain commodities in bulk, certain commodities requiring special handling, household goods, and certain explosives) in interstate and foreign commerce.

20. Pursuant to its operating authority, Plaintiff routinely transports general commodities among customers located in 46 states and Canada. Plaintiff transports general commodities between points where the most direct, efficient, and rapid routing would be through Iowa, and Plaintiff transports general commodities between customers served by its terminals located in Cedar Rapids, Iowa and Des Moines, Iowa, and other points in its system, and in interline service.

21. Interstate 80, beginning in the New York metropolitan area and terminating in the San Francisco metropolitan area is the principal east-west transcontinental highway in the United States, and provides the most direct route for general commodities from the Chicago area and points east to the central West Coast. Inter-

state 80 runs through Iowa from Davenport to Council Bluffs.

22. Interstate 36, beginning in Laredo, Texas and ending in Duluth, Minnesota is a principal, north-south interstate routing through Iowa from a point near Silver Lake, Iowa to a point near Lamoni, Iowa.

23. Interstate 235, is an alternate routing of Interstates 80 and 35 through the Des Moines, Iowa area.

24. Interstate 380, is a connector route connecting Cedar Rapids, Iowa with Interstate 80.

25. Interstate 280 is an alternate routing of Interstate 80 around and through the Moline-Rock Island-Davenport metropolitan area.

26. Interstate 680 is an alternate routing connecting Interstate 80 with Interstate 29 in the Council Bluffs area.

27. Interstate 29, beginning in Kansas City, Missouri and ending at the Canadian border at North Dakota, runs through Iowa from a point near Hamburg, Iowa to Sioux City, Iowa.

28. Attached hereto and incorporated herein are the following:

(a) Exhibit A: a map showing the national Interstate Highway System.

(b) Exhibit B: a map showing the portion of the National Interstate Highway System in Iowa.

(c) Exhibit C: a map showing the routing to Plaintiff Consolidated Freightways' terminal in Des Moines, and

(d) Exhibit D: a map showing the routing to Plaintiff Consolidated Freightways' terminal in Cedar Rapids.

29. A 65-foot twin trailer vehicle combination ("twin trailer") is the standard vehicle for interstate carriage of general commodities in the United States other than in the East Coast and Southeast regions. The vehicle combination consists of a truck-tractor, a trailer approximately 27 or 28 feet in length, a dolly and a second trailer approximately 27 or 28 feet in length. The entire vehicle combination has a length of 65 feet. Attached hereto and incorporated herein as Exhibit E are diagrams illustrating 27 foot twin trailers in combination and 28 foot twin trailers in combination.

30. Plaintiff Consolidated Freightways owns and operates twin trailers in those states where they are legally permissible, and routinely interchanges twin trailer equipment both within its own operations and with other carriers to provide service to and from areas where Plaintiff Consolidated Freightways is not authorized to provide direct service.

31. Section 321.457(6), Code of Iowa, 1977, prohibits the operation of standard sixty-five foot twin trailers in Iowa:

> "No combination of three (3) vehicles coupled together one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and back bumpers in excess of sixty feet."

32. As a direct consequence of this prohibition, Plaintiff Consolidated Freightways is forced to:

(1) divert through traffic from the most direct routing through Iowa to circuitous routings around Iowa;

(2) operate equipment to serve Iowa customers which is incompatible with its other equipment and with the equipment of other carriers with whom it interchanges equipment; and

(3) operate shuttle operations between other states and terminals in Iowa in which twin trailers are handled separately in single trailer-single tractor units between Iowa terminals and staging areas maintained near the Iowa border.

33. As a consequence of the Iowa ban, Plaintiff Consolidated Freightways' operations are disrupted and fragmented, its operating costs are significantly increased, and it is unable to provide prompt, efficient interstate transportation of goods.

34. Standard sixty-five foot long twin trailers are as safe or are safer than fifty-five foot semi-trailers or sixty foot twin trailer type vehicles which are permitted to operate regularly and routinely in Iowa.

35. Standard sixty-five foot twin trailers cause no greater road wear than is caused by fifty-five foot semi-trailers or sixty foot twin trailers which are permitted to operate regularly and routinely in Iowa.

36. Certain of Defendants and/or their predecessors in office have conducted, or caused to be conducted, studies of sixty-five foot twin trailers. Said studies have indicated that twin trailers are as safe or safer and cause no more road wear than sixty foot twin trailer type vehicles and fifty-five foot semi-trailer vehicles.

37. Iowa has created statutory and administrative exceptions to its general limitations on length which permit the operation in Iowa of vehicles longer than the State's general length limitations, including sixty-five foot twin trailers, where the operations of such vehicles are of principal benefit to Iowa industry, business, and residents.

38. The burdens placed on interstate commerce by the Iowa ban are not justified by legitimate local concerns or interest, are discriminatory, and violate Article I, Section 8 of the United States Constitution.

## III. SECOND CAUSE OF ACTION

39. Plaintiff realleges paragraphs 1 through 38 of this Complaint.

40. The actions of Defendants violate the Fourteenth Amendment of the United States Constitution.

## IV. THIRD CAUSE OF ACTION

41. Plaintiff realleges paragraphs 1 through 40 of this Complaint.

42. The actions of Defendants are done under color of state law.

43. The actions of Defendants violate 42 USC § 1983.

## V. RELIEF REQUESTED

WHEREFORE, on each of the causes of action, Plaintiff requests that this Honorable Court:

1. Enter a declaratory judgment holding that § 321-.457(6), Code of Iowa, 1977, and any other statute, regulation, or ordinance which places greater restrictions on the question of sixty-five foot twin trailers than are placed on the operation of fifty-five foot semi-trailers or sixty foot twin trailers on Interstate Highways 80, 35, 280, 380, 29, 680, and 235, access routes to and from Plaintiff's terminals, and reasonable access from said Interstate Highways to facilities for food, fuel, repairs, or rest are unconstitutional.

2. Enter an injunction restraining Defendants, and any other official of the State of Iowa, operating under Defendants' control, authority, or direction, and any other official charged with the enforcement of laws, or regulations, or ordinances, of the State of Iowa, or of any subdivision, local government or municipality there-

of, from enforcing § 321.457(6), Code of Iowa, 1977), or any other statute, regulation, or ordinance that would limit or burden the operations of sixty-five foot twin trailers on Interstate Highways 80, 35, 280, 380, 29, 680, or 235, access routes to and from Plaintiff's terminals, and reasonable access from said Interstate Highways to facilities for food, fuel, repairs, or rest, to a greater degree than the operation of trucks generally is limited or burdened.

8. Enter a judgment awarding to Plaintiff from Defendants and Defendant-Intervenors the reasonable attorneys' fees, costs and interests in this action.

Dated this 22nd day of November, 1978.

/s/ John H. Lederer
JOHN H. LEDERER
DEWITT, MCANDREWS & PORTER, S.C.
121 South Pinckney Street
P. O. Box 2509
Madison, Wisconsin 53701
(608) 255-8891

/s/ Terry C. Hancock
TERRY C. HANCOCK
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE
11th Floor, Des Moines Building
Des Moines, Iowa 50309
(515) 243-4191
*Attorneys for Plaintiff Consolidated Freightways Corporation of Delaware*

[Certificate of Service Omitted in Printing]

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANSWER OF DEFENDANTS, RAYMOND KASSEL, ET AL., TO PLAINTIFF'S AMENDED COMPLAINT

Filed February 2, 1979

[Caption Omitted in Printing]

COMES NOW, Defendants, and in answer state as follows:

I. JURISDICTION

1. The allegations contained in I, paragraph 1 of the Plaintiff's Amended Petition are denied.

2. The allegations contained in I, paragraph 2, of Plaintiff's Amended Petition are admitted.

3. The allegations contained in I, paragraphs 3 and 4 of Plaintiff's Amended Petition are admitted.

4. The allegations contained in I, paragraph 5 of Plaintiff's Amended Petition are denied. The Commissioner replacing Mr. Schoelman is Bruce Van Druff whose address is 806 Prospect Street, Red Oak, Iowa 51566.

5. The allegations contained in I, paragraphs 6 through 10 of Plaintiff's Amended Petition are admitted.

6. The allegations contained in I, paragraph 11 of Plaintiff's Amended Petition are denied. Jon McCoy is no longer the Director of the Motor Vehicle Division, State of Iowa. The position is currently vacant.

7. The allegations contained in I, paragraphs 12 and 13 of Plaintiff's Amended Petition are admitted.

8. The allegations contained in I, paragraph 14 of Plaintiff's Amended Petition are denied in that Thomas

J. Miller who resides at the State Capitol Building, First Floor, Des Moines, Iowa 50309, is now the duly elected Attorney General, State of Iowa.

9. The allegations contained in I, paragraphs 15 and 16 of Plaintiff's Amended Petition are admitted.

10. The allegations contained in I, paragraphs 17 and 18 of Plaintiff's Amended Petition are denied.

## II. FIRST CAUSE OF ACTION

1. The allegations contained in II, paragraph 19 of Plaintiff's Amended Petition are admitted.

2. The allegations contained in II, paragraph 20 of Plaintiff's Amended Petition are denied.

3. The allegations contained in II, paragraph 21 of Plaintiff's Amended Petition are denied. It is admitted that Interstate 80 runs through Iowa from Davenport, Iowa to Council Bluffs, Iowa.

4. The allegations contained in II, paragraphs 22, 23, 24, 25, 26, and 27 of Plaintiff's Amended Petition are admitted.

5. The allegations contained in II, paragraph 28 of Plaintiff's Amended Petition specifically Exhibits set out in subparagraphs (c) and (d) are denied for lack of sufficient information. Exhibits set out in subparagraphs (a) and (b) are admitted.

6. The allegations contained in II, paragraphs 29 and 30, of Plaintiff's Amended Petition are denied.

7. The allegations contained in II, paragraph 31 of Plaintiff's Amended Petition are denied. It is admitted that:

Section 321.457(6), Code of Iowa, 1977, reads:

> "No combination of three (3) vehicles coupled together, one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and rear bumpers in excess of sixty feet."

8. The allegations contained in II, paragraph 32 and subparts 1, 2, and 3 of Plaintiff's Amended Petition are denied.

9. The allegations contained in II, paragraphs 33, 34, 35, 36, 37 and 38 are denied.

## III. SECOND CAUSE OF ACTION

1. Defendants reanswer paragraphs 1 through 38 as set out in III, paragraph 39 of Plaintiff's Amended Petition.

2. The allegations contained in III, paragraph 40, of Plaintiff's Amended Petition are denied.

## IV. THIRD CAUSE OF ACTION

1. Defendants reanswer paragraphs 1 through 40 as set out in IV, paragraph 41, of Plaintiff's Amended Petition.

2. The allegations of IV, paragraph 42 and 43, of Plaintiff's Amended Petition are denied.

## V.

WHEREFORE, Defendants, on each the alleged causes of action, request that this Honorable Court:

1. Deny the Plaintiff any relief requested

2. Dismiss Plaintiff's Amended Petition, assessing costs and fees of this action to Plaintiff.

IOWA DEPARTMENT OF
TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

ROBERT W. GOODWIN
Special Assistant Attorney General
and General Counsel to
Department of Transportation

By /s/ Lester A. Paff
LESTER A. PAFF
Assistant Attorney General
Department of Transportation
Ames, Iowa 50010
1-515-296-1636

Copies to:

Richard Bittner
600 Union Arcade Bldg.
Davenport, Iowa 52801

Terry Hancock
Bradshaw, Fowler, Proctor
and Fairgrave
11th Floor Des Moines Bldg.
Des Moines, Iowa 50309

John Varda
DeWitt, McAndrews & Porter
121 South Pickney Street
Madison, Wisconsin 53703

[Proof of Service Omitted in Printing]

• • • •

IN THE DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

## ORDER

Filed May 16, 1979
[Caption Omitted in Printing]

This matter is now before the Court regarding the plaintiff's Motion to Bifurcate, filed may 7, 1979; . . .

* * *

With respect to the Motion to Bifurcate, the Court has carefully examined the motion and finds that all claims for reasonable attorney fees and costs should be separated from the trial of the other issues to be submitted in this lawsuit.

Accordingly,

IT IS FURTHER ORDERED that the plaintiff's Motion to Bifurcate filed May 7, 1979 be and is hereby granted and that all claims for reasonable attorney fees and costs are hereby bifurcated in the trial of other issues which commences June 4, 1979.

Dated this 16th day of May, 1979.

/s/ R. E. Longstaff
R. E. LONGSTAFF
U. S. MAGISTRATE

* * * *

# EIGHTH CIRCUIT COURT OF APPEALS

## Filed December 21, 1979

[Letterhead omitted in Printing]

December 20, 1979

Robert C. Tucker, Clerk
U.S. Court of Appeals for the 8th Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, MO 63101

Re: Consolidated Freightways v. Kassel, et al.
Case No. 79-1709

Dear Mr. Tucker:

Enclosed please find Appellee's Bill of Costs in the above-entitled action. Inasmuch as your letter of December 7, 1979, advised us to file a complete bill of costs, and reasonable attorney's fees may be taxed as costs under 42 USC §1988, our Bill of Costs includes those fees. We have separated those costs taxable under 42 USC §1988 from the other costs. Only fees under §1988 incurred in the appeal itself are included in the Bill of Costs.

Please be advised that the original complaint was brought under 42 USC §1983 and included a demand for attorney's fees. At the request of Plaintiff, the trial court bifurcated the trial, and the amount of attorney's fees to be awarded for the trial of the case has not been determined by the trial court. It is my understanding that opposing counsel will object to any taxation of attorney's fees. Appellee respectfully submits that judicial economy might be served by remanding the amount of fees on appeal to the trial court for determination.

Thank you for your kind attention.

Very truly yours,

DeWITT, McANDREWS & SUNDBY, S.C.

/s/ John H. Lederer

John H. Lederer

JHL:mw
Enclosure

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
*Appellants,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
*Appellee.*

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## BILL OF COSTS

This Honorable Court having affirmed the judgment of the Court below on December 7, 1979, Appellee requests the following taxation of costs against Appellants:

| | | |
|---|---|---|
| **Costs under 28 U.S.C. § 1920** | | |
| Printing of Briefs and Motions, Motion to Vacate Stay, Brief in Opposition to Motion for Stay, Brief | | $ 131.40 |
| **Costs under 42 USC § 1988** | | |
| Attorney's fees | | 41,911.00 |
| Disbursements | 3,528.70 | |
| (Less printing costs requested under 28 USC § 1920 above) | (131.40) | 3,397.30 |
| | | $45,439.70 |

Attached hereto and incorporated herein is an itemization and verification of the above fees and costs.

Dated at Madison, Wisconsin, this 20th day of December, 1979.

Respectfully submitted,

DEWITT, MCANDREWS & SUNDBY, S.C.

By: /s/ John H. Lederer
JOHN H. LEDERER
A Member of the Firm
Attorneys for Appellee

P.O. Address:

121 South Pinckney Street
Madison, WI 53703
Telephone: 608-255-8891

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
*Appellants,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
*Appellee.*

---

## RESISTANCE TO APPELLEE'S BILL OF COSTS

COME NOW, Appellants, and make the following response to Appellee's submission of its Bill of Costs.

1. Under Rule 39, Rules of Appellate Procedure or as set out in Appellee's Request under 28 U.S.C. § 1920.

Appellants *agree* that $45.90 may be taxed as costs

| | |
|---|---|
| 6 copies of brief on Appeal (51 pgs. at $.15/pg) | $45.90 |

Appellants *object* to the taxing of:

| | |
|---|---|
| 6 copies of Motion to Vacate Stay (14 pgs. at $.15/pg) | $12.60 |
| 6 copies of Brief in Opposition to Motion for Stay (81 pgs. at $.15/pg) | $72.90 |

2. Appellants object to *any* allowance of attorney's fees to Appellee under Rule 39, Rules of Appellate Pro-

cedure or as set out in Appellee's Request under 42 U.S.C. § 1988.

WHEREFORE, Appellants respectfully submit that $45.90 be taxed as costs against Appellants and that all other costs, disbursements and attorney fees be denied.

IOWA DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

ROBERT W. GOODWIN
Special Assistant Attorney General

/s/ Lester A. Paff
LESTER A. PAFF
Assistant Attorney General
Iowa Department of Transportation
General Counsel Division
Ames, IA 50010
Phone: (515) 296-1636

*Attorney for Appellants*

Copies to:

John Lederer
121 South Pinckney Street
Madison, WI 53703

Robert D. Lambert
600 Union Arcade Building
Davenport, IA 52801

Terry C. Hancock
1100 Des Moines Building
Des Moines, IA 50309

• • • •

# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

**September Term, 1979**

**No. 79-1709**

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
*Appellee,*

vs.

RAYMOND KASSEL, ETC., *et al.*,
*Appellants.*

Appeal from the United States District Court
for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

A true copy
Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit

• • • •

# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

---

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
*Appellants,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
*Appellee.*

---

## MOTION TO VACATE ORDER
## of January 16, 1980

Appellee, Consolidated Freightways Corporation of Delaware [CF], respectfully moves the Honorable Court to vacate its order dated January 16, 1980, to the extent that it denies CF's motion to tax disbursements and attorneys' fees as costs and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements under 42 USC § 1983 and § 1988. As grounds therefor, CF respectfully represents:

1. CF sought disbursements and attorneys' fees as taxed costs only because apparently required to do so to avoid waiver of the claim. CF assumed that the attorneys' fee question would be remanded to the trial court, which had severed the fee question under § 1983 and § 1988 from the case-on-the-merits, which was the only portion of the proceeding before this Court.

2. § 1983 and § 1988 are applicable.

3. The determination as to whether "special circumstances" warrant denial of attorneys' fees is particularly within the discretion of the trial court.

4. The trial court should be first permitted to determine whether this case presents "special circumstances" warranting denial of attorneys' fees.

5. If this Court is to rule on the question, CF should be permitted to file briefs and affidavits in support of its claim.

WHEREFORE, CF moves this Honorable Court to vacate its order dated January 16, 1980, and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements, under 42 USC § 1983 and § 1988, or, in the alternative, to permit CF to file briefs and affidavits in support of its claim.

Dated at Madison, Wisconsin, this 25th day of January, 1980.

Respectfully submitted,

DEWITT, SUNDBY,
HUGGETT & SCHUMACHER, S.C.

By /s/ John Duncan Varda
JOHN DUNCAN VARDA
A Member of the Firm

P. O. ADDRESS:
Box 2509
Madison, WI 53701
Telephone: 608-255-8891

OF COUNSEL:
Bradshaw, Fowler, Proctor & Fairgrave
11th Floor Des Moines Building
Des Moines, IA 50309
Telephone: 515-243-4191

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Case No. 79-1709

RAYMOND KASSEL, *et al.*,
*Appellants,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
*Appellee.*

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## RESISTANCE TO APPELLEE'S MOTION TO VACATE ORDER OF JANUARY 16, 1980

COME NOW, Appellants, Raymond Kassel, et al., and in Resistance state:

1. The Appellee, Consolidated Freightways Corporation of Delaware [CF] have selected this forum for determination of attorneys' fees and disbursements under 42 USC § 1983 and § 1988 for appellate work.

2. That § 1983 and § 1988 are not applicable.

3. That the question of "special circumstance" need not be addressed.

WHEREFORE, Appellants, Raymond Kassel, et al ask this Court to dismiss CF's Motion to Vacate, tax costs to CF, and such other orders as this Court deems just.

DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robert W. Goodwin
ROBERT W. GOODWIN
Special Asst. Attorney General

/s/ Lester A. Paff
LESTER A. PAFF
Assistant Attorney General
General Counsel Division
Ames, IA 50010
(515) 296-1636

Attorneys for Appellants

cc: John Varda
Tony Varda
John Lederer
Bob Lambert
Richard Bittner
Terry Hancock

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# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

**September Term, 1979**

**No. 79-1709**

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
*Appellee,*

v.

RAYMOND KASSEL ETC., *et al.*,
*Appellants.*

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.